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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MICHAEL COHN, Plaintiff and Appellant, v. TRUEBEGINNINGS, LLC et al., Defendants and Respondents.	B205319 (Los Angeles County Super. Ct. No. BC344082)

APPEAL from an order of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Affirmed.

The Rava Law Firm, Alfred G. Rava; The Christison Law Firm and Randall B. Christison for Plaintiff and Appellant.

Payne & Fears, Daniel L. Rasmussen and Julie Bisceglia for Defendants and Respondents.

Michael Cohn appeals from an order staying his action based on a finding that California is an inconvenient forum. We find no abuse of discretion and affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

Appellant brought this action against TrueBeginnings, LLC, its dba True.com, an Internet matchmaking service, and related entities (collectively respondents) in December 2005. He alleged that respondents discriminated against him and other men by offering women a free lifetime or long-time subscription to the Web site while providing only a one or two-week free trial subscription to men who signed up during the same period of time. He alleged this conduct constituted gender discrimination in violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and an unfair business practice in violation of Business and Professions Code section 17200 et seq.

Respondents, who are located in Texas, moved to dismiss the case on forum non conveniens grounds. The motion was based on a provision in the "Terms of Use" on respondents' Web site, under which an individual signing up for True.com agrees that any dispute involving the Web site or the service "will be governed by the laws of the State of Texas without regard to its conflict of law provisions. You agree to personal jurisdiction by and venue in the State of Texas and the U.S. District Court for the Northern District of Texas." Respondents argued that enforcement of this provision required that the dispute be litigated in Texas, not California.

Appellant opposed the motion on the ground that he had not linked to, reviewed, or agreed to any terms of use when he registered for a trial membership on the Web site. Thus, he had not agreed to litigate disputes with the Web site in Texas. He also asserted that even if he had agreed to a forum selection clause, its enforcement was not dependent upon a determination that the alternate forum was suitable. Instead, he argued, the court was required to balance various public and private interests before exercising its discretion whether to decline jurisdiction.

The court granted the motion and dismissed the action. Appellant filed a timely appeal from the order of dismissal. In a nonpublished opinion, *Cohn v. Truebeginnings*

LLC et al. (July 31, 2007, B190423) (*Cohn I*), this court held that in signing up for True.com services, appellant had agreed to the forum selection clause. But we did not read the clause as a mandatory designation of Texas as the exclusive forum for resolving disputes. Instead, we read it as a permissive forum selection provision, under which a party consents to jurisdiction and venue in Texas, and cannot object to litigation of disputes in that state on the ground that the court there lacks personal jurisdiction. Unlike a mandatory forum selection clause, which will be enforced without analysis of convenience of the forum so long as the alternate forum is a suitable place for trial, a permissive clause will be enforced only if the court finds the traditional forum non conveniens factors weigh in favor of declining jurisdiction in California. (See *Berg v. MTC Electronics Technologies Co.* (1998) 61 Cal.App.4th 349, 358-360.)

It was not apparent from the record on appeal in *Cohn I* whether the trial court granted the motion based solely on the existence of the forum selection clause, or whether it weighed the traditional forum non conveniens factors and exercised its discretion. For this reason, we remanded the cause for the court to exercise its discretion in ruling on the motion.

On remand, respondents sought a stay of California proceedings, rather than dismissal. (See *Berg v. MTC Electronics Technologies Co., supra,* 61 Cal.App.4th at p. 356 [California's interest in ensuring fair treatment of California plaintiffs is why the law generally allows for a stay, and only rarely permits dismissal of an action filed by California residents].) The court invited further briefing, heard argument, and granted the requested stay for forum non conveniens. This is a timely appeal from that order, which is appealable under Code of Civil Procedure section 904.1, subdivision (3).

DISCUSSION

I

"In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public

in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation." (*Stangvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, 751 (*Stangvik*).)

The threshold issue of a suitable forum is easily resolved in this case. "A forum is suitable if there is jurisdiction and no statute of limitations bar to hearing the case on the merits." (*Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1036-1037.) Under the forum selection clause, appellant agreed "to personal jurisdiction by and venue in the State of Texas . . . ." Appellant argued that if the action had to be filed in Texas, the Texas court might hold that the statute of limitations had expired. Respondents expressly agreed in open court to waive that defense. "It is sufficient that the action can be brought, although not necessarily won, in the suitable alternative forum." (*Morris v. AGFA Corp.* (2006) 144 Cal.App.4th 1452, 1464.) We conclude, as did the trial court, that Texas is a suitable forum.

We turn to the abuse of discretion review of the trial court's balancing of the private and public interests described in *Stangvik* and its progeny. The test for abuse of discretion is whether the trial court exceeded the bounds of reason. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) Where two or more inferences can reasonably be deduced from the facts, we may not substitute our decision for that of the trial court. (*Ibid.*) In our review, we also are mindful of the warning in *Stangvik* that the trial court must be flexible in its consideration of the factors, without undue emphasis on any one element. (*Stangvik, supra*, 54 Cal.3d at p. 753.)

We begin with consideration of the private interests of the parties. A plaintiff's choice of forum is presumed to be convenient, but if a corporation is the defendant, the

state of its incorporation and the place where its principal place of business is located is also presumed to be a convenient forum. (*Stangvik, supra*, 54 Cal.3d at pp. 754-755.) Appellant is a California resident; respondent is a Texas company, with its principal place of business in Texas. This factor is evenly balanced.

Many other factors favor Texas as a forum. Any judgment appellant obtained would be enforceable in Texas. In addition, the majority of likely witnesses are in Texas. Appellant did not identify any likely witnesses in California other than himself. But respondent's president, Ruben Buell, identified himself and eight employees or former employees as potential witnesses in the case. All the named individuals are Texas residents. Not only would their attendance at a California trial be inconvenient, but those no longer employed by respondent would be beyond the subpoena power of the California courts. (Code Civ. Proc., § 1989.) Mr. Buell also stated that all documents regarding the promotion that is the subject of this case are located at the company offices in Texas.

Appellant's response was that "there is not much testimony needed here from Defendants' employees because this is a simple case, most likely to be decided on summary judgment." But appellant acknowledges in his reply brief that there is no certainty in this regard.

In addition to these factors, the court noted that "the Texas forum was clearly contemplated by both parties upon entry into their agreement. Therefore, the Court finds that the forum selection clause tilts the balance of equities heavily in favor of Texas and the True.com parties." The court then concluded that Texas would be the better forum "from the standpoints of both economic feasibility, and the ability to effectively and easily compel the attendance of witnesses." Appellant's assertion that the court relied primarily on the forum selection clause is not supported by the record. The court properly considered several factors, in addition to the forum selection clause, in reaching the conclusion that "the private interests at play favor the Texas forum."

We turn to the public interest factors. One of these is "avoidance of overburdening local courts with congested calendars, . . ." (*Stangvik, supra*, 54 Cal.3d at

p. 751.) In support of their motion, respondents submitted charts from the Web site of the Office of Court Administration of Texas, showing the disposition rates of civil cases between September 1, 2005 and August 31, 2006, and from October 1, 2006 to September 30, 2007. They also submitted charts from the Web site of the Administrative Office of the Courts for the State of California, showing the disposition rate of civil cases for the 2005-2006 fiscal year.

Appellant objected to these exhibits for lack of foundation, arguing that "declarant does not state or provide any information on how she has personal knowledge that these documents are what she declares them to be." Respondents' counsel stated in her declaration that she had obtained the Texas charts from the Web site of the Office of Court Administration of the Texas state courts, and the California charts from the Web site of the Administrative Office of the Courts of the State of California. This adequately establishes that the statistical reports were obtained from the official court Web sites of these two states, and hence were official records. (Evid. Code, § 1280.) Under Evidence Code section 1552, subdivision (a), "[a] printed representation of computer information . . . is presumed to be an accurate representation of the computer information . . . that it purports to represent." The trial court correctly overruled this objection.

The Texas chart shows that in 2005-2006, in Dallas County, where respondents are located, 80 percent of civil cases were resolved within 12 months (29 percent within three months, 21 percent within six months, and 30 percent within 12 months). In contrast, during a similar time period in Los Angeles County, 65 percent of its unlimited civil cases were resolved within 12 months. This supports the conclusion that the local California court would be more heavily burdened than the Texas court, and thus that the public would benefit from having the action heard in Texas.

The court found no need to protect jurors in either forum from deciding a dispute peripheral to their local interest, based on appellant's suggestion that the matter would likely be settled by summary judgment. But even if the matter were to be tried by a jury, there is a legitimate local interest in either forum, and similar inconvenience to individuals who are called to serve as jurors. This factor is neutral.

That brings us to the final factor relied on by the trial court: "[W]hile preventing gender discrimination is important to the California forum, there is no suggestion that this interest is more important to Californians than it is to Texans, or indeed to the federal courts."

Appellant's action is premised on the Unruh Civil Rights Act, which provides that all persons in California are "free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) It also is premised on the Gender Tax Repeal Act of 1995 (Civ. Code, § 51.6), which prohibits business establishments "of any kind whatsoever" from discriminating with respect to the price charged for services based on a person's gender.

Respondents admit Texas lacks the specific statutory protections against discrimination and discriminatory pricing by private businesses afforded by California's Unruh Civil Rights Act and Gender Tax Repeal Act. But "the fact that an alternative jurisdiction's law is less favorable to a litigant than the law of the forum should not be accorded any weight in deciding a motion for forum non conveniens, provided, however, that some remedy is afforded." (*Stangvik*, *supra*, 54 Cal.3d at p. 754, fn. 5.)

Respondents point to the commitment to gender equality expressed in article I, section 3a of the Texas Constitution: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Respondents also cite a number of Texas statutes proscribing discrimination on the basis of gender: in housing (Tex. Property Code, § 301.021); in employment (Tex. Lab. Code, §§ 21.051, 21.052); in the provision of hospital emergency services (Tex. Health & Saf. Code, § 311.022, subd. (c)); in lending money (Tex. Fin. Code, § 341.401, subd. (a)); in issuing mortgage insurance (Tex. Ins. Code, § 3502.053.) They also note a Texas public school cannot sponsor an extracurricular activity at an athletic club that discriminates on the basis of sex (Tex. Ed. Code, § 33.082); a Texas bar is subject to losing its license if the license-holder is convicted of discriminating on the basis of sex (Tex. Alcoholic Beverage Code,

§ 109.56); and a Texas family law court is prohibited from discriminating on the basis of sex in setting the amount of child support (Tex. Fam. Code, § 154.010.) We need not engage in an exhaustive study of the public policy of Texas to conclude that it has a strong public policy prohibiting gender discrimination.

Through legislation and constitutional amendment, both states have demonstrated a strong policy against gender discrimination and a desire to deter such conduct by businesses. And at this juncture there has been no determination whether the dispute will be decided under California law or Texas law. The terms of service on the True.com Web site provide that disputes "will be governed by the laws of the State of Texas without regard to its conflict of law provisions." If it is held enforceable, this clause would limit appellant's ability to proceed under California law, whether the forum is California or Texas. And if it is not enforced, appellant may argue that he should have the benefit of California law, even if the case proceeds in Texas. The court did not err in concluding that, with regard to the public interests, "there is no compelling interest to select California."

The trial court's balancing of the private interests of the litigants and the interests of the public in retaining an action in California is entitled to substantial deference. (*Chong v. Superior Court, supra*, 58 Cal.App.4th at p. 1037.) The trial court here carefully weighed the factors identified in *Stangvik*, and concluded that the public and private interests in this case favor Texas as the more convenient forum. The record strongly supports this conclusion. Most witnesses are located in Texas, including some who would be beyond the subpoena power of this state; a judgment against respondents would be enforceable in Texas; and the parties expressly contemplated Texas as the appropriate forum pursuant to the permissive forum selection clause contained in the terms of service. Based on the reports of the Office of Court Administration in Texas and the Administrative Office of the Courts in California, the time for processing of civil actions in Dallas County is substantially shorter than the time for processing civil actions in Los Angeles County, supporting Texas as a convenient forum. And finally, both states have shown a substantial interest in prohibiting gender discrimination. Thus, as the court

found, on balance, the private and public interests favor Texas as the more favorable. The court did not abuse its discretion in staying the action in California on the ground of forum non conveniens.

DISPOSITION

The order is affirmed. Respondents to have their costs on appeal.

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EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.